IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003284

First-tier Tribunal No: EA/16524/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 22 February 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

SYRJAN KOLECI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Schymyck, counsel, instructed by Eric Smith Law
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2023

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal (FtT) Judge L K Gibbs (the judge) promulgated on 24 May 2022. The appellant had begun a relationship with the sponsor (Xenia Galeco, a citizen of Spain) in 2018. The appellant applied to the respondent under the EU Settlement Scheme on 23 June 2021 and he married the sponsor on 20 August 2021. The respondent refused the application on 3 December 2021, leading to the appeal to the FtT.

2. The respondent refused the application on the basis that the appellant had not proved he was a durable partner of the sponsor. He failed to do so because he

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did not hold a valid family permit or residency card, which are required to bring an applicant within the definition of a ‘durable partner’ under Appendix EU to the Immigration Rules. By the time of the FtT hearing, the respondent also pointed to the date of the appellant’s marriage as a reason he did not qualify as a ‘family member’ of the sponsor. This is because their marriage took place after 2300hrs on 31 December 2020 (‘the specified date’).

3. In the FtT the appellant did not seek to persuade the judge that he could succeed under the Immigration Rules, but rather argued that the respondent’s decision breached his rights under the Withdrawal Agreement and was disproportionate.

4. The proportionality argument in the FtT was to the effect that the respondent’s decision failed properly to take into account that the appellant and sponsor were unable to marry due to COVID restrictions.

5. Whilst finding that the relationship is a genuine one, the judge dismissed the appeal on both of the grounds on which an appeal can be brought under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020. First, the judge found that the appellant had not proved he came within art 10 of the Withdrawal Agreement (which concerns the personal scope of the Withdrawal Agreement): His presence in the UK was not facilitated by the respondent before the end of the transition period, nor had the appellant applied for facilitation before the specified date.

6. Second, the judge found that the respondent’s decision was not disproportionate in light of the difficulties in getting married arising out of the pandemic. The judge was of the view that the appellant would have been able to make a human rights application to stay in the UK under Appendix FM to the Immigration Rules.

7. The appellant’s grounds of appeal submitted that the judge had given inadequate reasons for finding that the respondent’s refusal had not breached the appellant’s rights under the Withdrawal Agreement.

8. Permission to appeal to the Upper Tribunal was granted on 13 June 2022 by the FtT.

THE HEARING

9. Mr Schymyck appeared for the appellant and was present earlier in the day when another case with very similar issues was argued before us. In that case, Mr Hawkin of counsel represented the appellant and Ms Isherwood represented the respondent. We mention this as Mr Schymyck subsequently adopted some of Mr Hawkin’s arguments from that case. Ms Isherwood was content for him to do so.

10. In submissions by both parties we were referred to the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), which was decided by the Upper Tribunal after the instant case was determined in the FtT. The judicial headnote of Celik is as follows:

> *(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P’s entry and residence were being facilitated*

before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.

(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.

11. We were also referred to the respondent's guidance at https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-relationship-to-an-eu-citizen ('the respondent's guidance'). The following part is said to be relevant (we have added emphasis):

> ***If you're their unmarried (durable) partner***
>
> *You must hold a relevant document issued to you on the basis that you're the durable partner of an EEA or Swiss citizen or person of Northern Ireland.*
>
> *A relevant document here includes:*
>
> - *a family permit issued under the EEA Regulations*
> - *an EU Settlement Scheme family permit*
> - *a residence card issued under the EEA Regulations or the EU Settlement Scheme*
> - *a letter from the Secretary of State confirming your qualification for a family permit or residence card under the EEA Regulations, had the route not closed after 30 June 2021*
>
> *If you're the unmarried (durable) partner of a person of Northern Ireland and have yet to apply, you're unlikely to have a relevant document.*
>
> ***If you do not have a relevant document, you'll need to show evidence:***
>
> - ***of your relationship to your unmarried (durable) partner***
> - ***that your relationship existed by 31 December 2020***
> - ***that your relationship continues to exist on the date you apply, or existed for the period of residence relied upon***

The list below gives some examples of evidence you can provide. This list is not exhaustive and other forms of evidence may be accepted. Each case will be considered on a case by case basis*.*

Evidence that you had lived together for at least 2 years by 31 December 2020:

- *bank statements or utility bills in joint names at the same address*
- *residential mortgage statement or tenancy agreement in joint names*
- *official correspondence that links you at the same address*

Evidence of joint finances, business ventures or commitments for at least 2 years by 31 December 2020:

- *tax returns, business contracts or investments*

Evidence of joint responsibility for a child by 31 December 2020:

- *the child's birth certificate which names both parents*
- *a custody agreement showing that you're living together and sharing parental responsibility*

The evidence will need to show that you're still the unmarried (durable) partner of the EEA or Swiss citizen or the person of Northern Ireland, or that you are now their spouse or civil partner.

12. Mr Schymyck began his submissions by seeking an adjournment of this case on the basis that the appellant in Celik has sought permission to appeal to the Court of Appeal. He adopted the submission in the case we had heard earlier the same day, that it would be sensible to adjourn this case pending the outcome of the appeal in Celik. Permission to appeal has not yet been granted and a date for that appeal has not been set. An adjournment of this case, said Mr Schymyck, would save parties' and judicial resources.

13. The respondent opposed the application to adjourn, saying that we should apply the law as it currently stands in Celik.

14. We considered the application for an adjournment and took into consideration the overriding objective of dealing with cases justly and fairly, including dealing with the case in a proportionate manner and avoiding delay as far as is compatible with proper consideration of the issues. We noted that there is no date set for the Court of Appeal to consider Celik, and that permission to appeal has not (yet) been granted. It may be that other cases are added to that appeal and we cannot judge with any level of confidence how long it will take for the case to come to a conclusion. We concluded that adjourning this case would create an unjustifiable delay and that the interests of justice and the overriding objective were best served by not granting the application for an adjournment.

15. The appellant sought to argue the appeal on as basis which (it seems to us) is different to that pleaded in the grounds of appeal. Once these were outlined to the respondent, she was content to respond to a revised basis of appeal. The appellant submitted that:

a. The judge erred in law when analysing the meaning of Art 10 of the Withdrawal Agreement and facilitation within that. The appellant's residence in the UK was facilitated by his relationship with the sponsor, and the fact that this was not regularised by documents does not detract from that. The definition of durable partner in Appendix EU can include an applicant who does not hold (nor has applied for) a relevant document;

b. Acknowledging that Celik is the current state of the law, Mr Schymyck submitted that proportionality is a proper consideration and that the judge erred in failing to consider how the respondent's guidance factored in the question of proportionality.

c. Mr Schymyck argued that the judge failed to take into consideration the respondent's guidance. Art 18 of the Withdrawal Agreement contains a discretion for the respondent which should have been exercised in favour of the appellant in accordance with the respondent's guidance. The respondent's guidance, submitted Mr Schymyck, suggests that for those who didn't have a relevant document prior to 31 December 2020 it was sufficient to point to other evidence of the relationship.

16. For the respondent, Ms Isherwood submitted that this case is on all fours with Celik and should be refused on that basis. In addition, the proper interpretation of Appendix EU is that an applicant who is in the UK does need to have applied for a relevant document (the application process for such document shows facilitation) in order to fall within the definition of a durable partner.

DISCUSSION AND CONCLUSION

17. When considering Art 10 of the Withdrawal Agreement, the judge found at [13] that the appellant, far from being facilitated in his presence in the UK, was living in the UK without a lawful basis and had not applied for facilitation of his stay.

18. The appellant argued before us that his presence in the UK was facilitated by the very relationship with the sponsor, even if not regularised by an application to the respondent under the Immigration Rules. Turning to the wording of the Withdrawal Agreement, we see that a right of residence is described as occurring for someone "*whose residence was facilitated by the host State in accordance with its national legislation*". That requirement to be facilitated *in accordance with national legislation* is repeated throughout the references to facilitation in the Withdrawal Agreement. We were not taken to any part of the Immigration Rules, or any other national legislation, that provides for facilitation by reference to the existence of a relationship alone. We consider that the wording of Art 10(2) does not support the line of argument that facilitation occurs simply by the existence of a relationship – that interpretation is not in accordance with national legislation. Nor is it in accordance with the established meaning of that term, as is clear from decisions such as Macastena v SSHD [2018] EWCA Civ 1558; [2019 1 WLR 365 and Rahman v SSHD [2013] QB 249. A person whose residence 'was facilitated' can only mean a person who was eligible for discretionary consideration under Article 3(2) of the Citizens Directive *and* who has received a favourable decision in that regard.

19. The appellant also points to the definition of 'durable partner' under Appendix EU, adopting an argument that the wording of paragraph (b)(ii) of the definition of durable partner, allows for an applicant who does not hold a relevant document to satisfy the requirement that their presence in the UK is facilitated.

This argument is not available to the appellant. It was accepted before the First-tier Tribunal that the appellant could not succeed under the Immigration Rules: [12] of the judge's decision refers. No application to withdraw that important concession has ever been made. No arguments to that effect were advanced in the grounds of appeal to the Upper Tribunal.

20. We have considered the point notwithstanding the procedural obstacles in Mr Schymyck's path. The relevant part of para (b)(ii) to this argument is as follows (emphasis added):

> *(b)*
>
> > *(i) the person holds a relevant document … or*
> >
> > *(ii) where the person … does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:*
> >
> > > *(aa) the date of application is after the specified date; and*
> > >
> > > *(bb) the person:*
> > >
> > > > *(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date,* ***unless*** *the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period; or…*

21. The argument is that this is to be interpreted as meaning that a person who does not hold a relevant document, nor had another lawful basis of stay in the UK, does satisfy the requirement of having their presence in the UK being facilitated. The respondent argues that this is not a proper interpretation.

22. We have not found the provision above at all easy to understand. The search in any such case is for the plain and ordinary meaning of the provision (Mahad v ECO [2009] UKSC 16; [2010] WLR 48) but we have not found that search straightforward in this case. The drafting of Appendix EU is at times impenetrable. It goes beyond the 'idiosyncratic drafting conventions' and 'confused language' encountered elsewhere in the Immigration Rules by Underhill LJ in Hoque & Ors v SSHD [2020] EWCA Civ 1357.

23. We agree that the part of the definition of durable partner we reproduce above does provide for an applicant to qualify as a durable partner where they do not have a relevant document. However, we find that the opening phrase of b(ii)(bb)(aaa) requires the applicant to have been resident outside the UK at the material time. The phrase '**unless** the reason why, in the former case, they were not so resident' cannot refer to someone who was resident in the UK because 'the former case' apparently refers to an applicant who is not resident in the UK. That

reading of the provision is supported by considering the alternatives in the next two provisions ((bbb) and (ccc)), which both refer to individuals who *were* resident in the UK before the specified date. We cannot see how paragraph (aaa) can avail an applicant in the position of this appellant, who was resident in the UK before the specified date.

24. To interpret it in the way the appellant asks us to would mean that paragraph (b) of the definition of 'durable partner' boils down to 'someone with a relevant document, or someone who applied after the specified date and does not have a relevant document'. Such an interpretation is not only lacking in logic, but goes against the purpose of the Withdrawal Agreement (stated in its recital) to provide protection for Union citizens and their family members "*where they have exercised free movement rights before a date set in this Agreement*" (the specified date). We conclude that paragraph b(ii)(bb)(aaa) of the definition of a durable partner does not apply to the appellant.

25. Whether analysing the first ground of appeal through the lens of the Withdrawal Agreement or the Immigration Rules, we find that the judge did not err in law when finding that the lack of an application for facilitation meant that the appellant's presence in the UK was not facilitated.

26. The judge considered whether the appellant had proved the decision of the respondent was disproportionate and concluded that the appellant had not proved this [15]. We find that this case sits squarely within the circumstances outlined within the judicial headnote of Celik. An argument on proportionality was simply not available to the appellant. Whilst there may be an academic argument on whether the judge erred by considering proportionality at all (and we remind ourselves that Celik had not been decided at the time of the judge's determination), the end result is the same – that the appellant is not assisted by pleading disproportionality. The judge made no material error in this respect.

27. The third ground argued before us was that the judge erred by not properly considering the respondent's guidance. This ground (which was argued more fully in the earlier case we heard and which arguments Mr Schymyck efficiently and properly adopted in this case) relies on SF and others (Guidance, post–2014 Act) [2017] UKUT 120 ('SF (Albania)'). Whilst we have found that the judge made no material error in respect of proportionality, we have nevertheless considered whether the respondent's guidance would meet the test in SF (Albania).

28. We reproduce the judicial headnote and [12] of that decision here:

> *Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.*
>
> *…*
>
> *[12] On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been*

> *made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.*

29. However, the grounds of appeal available to the appellant are limited by the terms of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. It may be submitted that the decision is contrary to the Withdrawal Agreement, or to the Immigration Rules, or both. The appellant does not (and did not) have available to him a ground of appeal that the respondent's decision was contrary to published policy or that it was otherwise not in accordance with the law. The Article 8 ECHR mechanism by which the policy was brought to bear in SF (Albania) is not available to the appellant. The only way in which the guidance might be factored into the equation, therefore, is via a proportionality assessment under the terms of the Withdrawal Agreement but, as held in Celik, the appellant cannot rely on Article 18(1)(r) of that agreement because he is not in personal scope of the agreement.

30. The respondent's guidance does seem – on one reading – to indicate that the respondent would consider evidence of a 2-year relationship at the point of application as being akin to a relevant document. This interpretation comes from the excerpt of the respondent's guidance that we have repeated above in bold. However, the respondent's guidance at this point seems to conflate the question of whether the applicant and sponsor are in a durable relationship, and the question of whether the applicant's presence in the UK has been facilitated. We consider that these are separate requirements under the immigration rules. This is because the definition of 'durable partner' in Appendix EU is split into component parts of 'durable relationship' (at para (a) of the definition) and facilitation (addressed by para (b) of the definition).

31. Given the distinction in the Immigration Rules between these separate requirements, their conflation in the respondent's guidance to applicants is confusing. This results in the respondent's guidance not 'pointing to a particular outcome in this case', as required by SF (Albania). We therefore find that the guidance could not have swung a proportionality assessment in the appellant's favour, even assuming that an argument on proportionality was available to him.

32. The judge did not err in finding that the appellant's presence in the UK was not facilitated. The judge made no material error of law in the approach taken to proportionality, and we find that the judge made no error of law in relation to the respondent's guidance.

Notice of Decision

The decision of First-tier Tribunal Judge Gibbs promulgated on 24 May 2022 does not involve any material error of law. We uphold the decision and the appellant's appeal therefore remains dismissed.

D Cotton

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 January 2021